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JAMES D. MAHER,
CLERK.

[redacted] Supreme Court
of the
United States

October Term, 1919

No. [redacted]202

[redacted] Kearney and C. S. Kearney,
Plaintiffs in Error,

vs.

Patrick A. Maguire et al., as Commissioners Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California for and for the First Appellate District, Division One.

[redacted] FOR PLAINTIFFS IN ERROR.

J. F. [redacted],
Attorney for Plaintiffs in Error.

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(27,362)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1919

No. 607

MICHAEL MAGUIRE and C. S. MAGUIRE,
Plaintiffs in Error,

vs.

TIMOTHY A. REARDON et al., as Commissioners, Constituting the Board of Public Works of the City and County of San Francisco et al.,
Defendants in Error.

In Error to the District Court of Appeal of the State of California in and for the First Appellate District, Division One.

OPENING BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to the District Court of Appeal, First Appellate District, Division One, State of California.

The case went to said District Court of Appeal upon an appeal from the judgment of the Superior Court of the City and County of San Francisco, in which latter Court the matter was submitted on an agreed statement of facts, in substance as follows:

In May, 1906, a wooden building costing $12,000 was erected within the limits described in the ordinance hereinafter referred to.

At the time of the erection of the building there were in existence, an ordinance of the City and County of San Francisco and a charter provision, as follows:

Charter Provision.

"Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power * * *

5. To fix the limits within which wooden buildings or structures shall not be erected, placed, or maintained, and to prohibit the same within such limits. Such limits when once established shall not be changed except by extension."

Ordinance No. 1198.

"Be it ordained by the People of the City and County of San Francisco as follows:

Section 1. The fire limits shall be bounded by a line commencing (describing a district within which is the building in question).

Section 2. Every person, company or corporation violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment."

By and with the consent of the defendants in error, and under the written permit and supervision of the Board of Public Works of the said city and county, an oven, costing $700 was installed in said building and is still a part of said building.

The building consists of nine stores which were and are rented to tenants, duly licensed by said city and county to conduct businesses in said stores.

The plaintiffs in error paid taxes on said building to the said city and county, from the time of its erection to the present time, and said building is still assessed and taxed by said city and county.

The said City and County of San Francisco has since the erection of said building above described, erected and maintained and used, and is now maintaining and using in the same district or fire limits (referred to above, and in the alleged ordinance in the amended answer set forth) in and within which said building belonging to plaintiffs is situated, wooden buildings, including two firehouses, two wooden buildings used as school rooms, and one police station, in which many human beings are housed and some kept and detained.

On December 22, 1909, three and one-half years after the construction of the building in question, Ordinance 1008 (new series), was enacted, as follows:

"Regulating the Construction, Erection, Enlargement, Raising, Alteration, Repair, Removal, Maintenance, Use, and Height of Buildings; Regulating Character and Use of Mate-

rials in and for Buildings; Establishing Fire Limits, and Repealing all Ordinances in Conflict with this Ordinance."

Section 3 of said Ordinance No. 1008 (new series) has never been repealed. Said section 3 of said Ordinance No. 1008 (new series) at all times read and provided and now reads and provides as follows:

"Section 3. That portion of the City and County of San Francisco within the boundary lines in this section hereinafter set forth shall be known as the fire limits within which it shall be unlawful to erect or construct frame or wooden buildings, or to alter, enlarge, repair, add to or build upon any building or buildings except as in this ordinance otherwise provided, viz.:" (describing territory)

The said building was within the territory described in said ordinance.

On May 8, 1917, an Ordinance No. 4170, was enacted as follows:

"Ordinance No. 4170 (new series).

Amending Ordinance No. 1008 (new series) known as 'The Building Law' approved December 22, 1909, by adding thereto a new section to be numbered '301a'.

Be it ordained by the People of the City and County of San Francisco as follows:

'Section 1. A new section is hereby added to Ordinance No. 1008 (new series) known as "The Building Law" to be numbered 301a to read as follows:

'Section 301a. It shall be unlawful for any person, firm, company or corporation to erect, place or maintain any wooden building or struc-

ture of any kind whatsoever in that portion of the City and County of San Francisco described in section 3, part 2 hereof as the Fire Limits.'

It is hereby made the duty of the Board of Public Works to enforce the provisions of this section and said Board of Public Works is hereby authorized and directed to demolish and remove any building or structure affected by this section upon the failure of the owner or owners thereof to comply with the terms of this section; and the cost of said demolition and removal shall constitute a first lien on said building or structure and the material thereof.

Ordinance No. 1139 (new series) approved April 12, 1910, is hereby repealed."

Assuming to act under the authority given by said last mentioned ordinance (4170, new series), the Board of Public Works in October, 1917, more than eleven years after the erection of the building, without a hearing being given the plaintiffs in error, served notices on the plaintiffs in error and their tenants to the effect that under Ordinance No. 4170 (new series), approved May 8, 1917, it would, upon failure of the owners of said building to demolish and remove said building within five days after service of the notice, demolish and remove the same. (Trans. fols. 48-50, pp. 23 and 24).

An action was commenced by plaintiffs in error to restrain defendants from so demolishing and removing said building; judgment went for defendants; from that judgment an appeal was taken, and the judgment being affirmed by the District Court of Appeal, and an application for a rehearing denied, application to the Supreme Court for a

hearing was made and denied; and thereupon said writ of error was sued out.

The question is, Can the defendants, under said circumstances, without a hearing, without a determination by a Court of competent jurisdiction that the building is a public nuisance, demolish and remove the building?

Specifications of Errors.

The said State Courts erred in holding and deciding:

(1) That the said charter provision and Ordinance No. 4170 are and each of them is not discriminatory and unlawful in prohibiting the erection and maintenance of wooden buildings, and in not prohibiting the erection and maintenance of buildings of canvas, beaver board, papier-mache or other materials equally as or more inflammable than wood, and in holding and deciding in effect, that the application and administering of said charter provision and ordinance by said defendants, by themselves erecting and maintaining in the same district buildings of like construction with that sought to be destroyed, are not discriminatory and are not a denial of equal justice within the prohibition of the constitution of the United States;

(2) That said charter provision and said ordinance do not provide for the destruction of buildings and the deprivation of vested rights, without due process of law, and without compensation, in

violation of Section 1, Article XIV of the Constitution of the United States;

(3) That said Ordinance No. 4170 is not retroactive and unreasonable;

(4) That said charter provision and Ordinance No. 4170 authorized defendants to demolish and remove said building without a hearing; and in holding and deciding in effect, that the application and administering of said charter provision and ordinace by said defendants, by themselves erecting and maintaining in the same district, buildings of like construction with that sought to be destroyed, are not discriminatory, and are not a denial of equal justice within the prohibition of the constitution;

(5) That said Supreme Court of the State of California, erred in denying a hearing after the decision of the said District Court of Appeal, and thereby affirming the judgment of said Superior Court;

(6) That said charter provision and Ordinance No. 1198, did forbid and make unlawful the erection and maintenance of said building.

I.

AT TIME OF ERECTION OF BUILDING THERE WAS NO RESTRICTION ON MATERIAL TO BE USED.

The only ordinance in effect at the time of the erection of the building in any way affecting the building was Ordinance No. 1198.

Said ordinance is entitled "Defining the Fire Limits of the City and County of San Francisco," describes certain territory, and in section 2 makes it a misdemeanor to violate the provisions of the ordinance.

It will be noted that there is no provision in the ordinance stating for what purpose the limits are established—whether as a district in which powder factories may not be erected, or manufacturing plants conducted, or steam engines installed, or canvas buildings erected. In fact, there is no inhibition of any kind whatever in said ordinance.

THERE IS NO PROVISION OF SAID ORDINANCE NO. 1198 WHICH CAN BE VIOLATED.

Defendants contended, however, that this ordinance should be read in connection with the above referred to provision of the charter, which reads as follows:

> "Section 1. Subject to the provisions, limitations and restrictions in this charter contained, the Board of Supervisors shall have power:
>
> "(5) To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.* Such limits when once established shall not be changed except by extension." (Italics ours.)

It is not contended that the Board of Supervisors ever exercised the power given them by said charter provision, to prohibit the erection or maintenance of wooden buildings within said limits until December 22, 1909, three and one-half years after

the construction of the building in question, when Ordinance No. 1008 (new series) was enacted. This ordinance *did in express terms* make it unlawful to erect frame or wooden buildings within the restricted district (Trans. p. 27, fol. 57).

The particular ordinance under which respondents claim to act, however, is Ordinance No. 4170 (new series), approved May 8, 1917, about five months before the threat to demolish our building which had been erected eleven years before the ordinance was passed, upon which said city and county had been receiving taxes for eleven years, and from the tenants in which it had been receiving license taxes for the same length of time, was made and served.

These questions are thus squarely presented:

(1) Does an ordinance merely stating how the "fire limits" shall be bounded, *forbid* the erection of buildings?

(2) Does a charter provision giving to a Board of Supervisors the power to fix limits within which wooden buildings shall not be constructed or maintained, by itself, without action by the Board of Supervisors, forbid the erection or maintenance of such buildings?

(3) Can a city, by an ordinance passed years after the erection of a building, which building it has taxed and from which it has received income for years, the right to maintain which it has recognized for years, authorize the demolition and re-

moval of said building, and especially where, as admitted here, the city has itself continuously, since the erection of the building in question here, erected and maintained, and is still maintaining and using buildings of identical construction within the very same district?

We would call your honors' attention to the fact that the conclusion of the Superior Court is that the building was erected and constructed, *"in violation of law, to wit: in violation of the provisions of said Ordinance No. 1198 and subdivision 5, section 1, chapter II of article II of the charter of the City and County of San Francisco"*.

Counsel for defendants contended in the lower Court that the case of Bancroft v. Goldberg Bowen & Co., 16 Cal. App. Dec. 37, and (on rehearing) in 166 Calif. 416, authorized the conclusion that said ordinance and charter provision justify the action of the Board of Public Works.

That case is not authority for the reason that the *facts* in that case are very different from those in the case at bar.

In the Bancroft case, the *record* showed the existence *at the time of the erection* of the building, of an ordinance *forbidding the erection of such building*.

While in this case, no such ordinance was in existence at the time of the erection of the building, the first ordinance forbidding the erection of wooden (frame) buildings having been enacted in Decem-

ber, 1909, over three years after the erection of the building.

We would state further that the opinion of the District Court of Appeal in the Bancroft case, is not authority, a rehearing having been granted and an opinion filed by the Supreme Court of California.

The question in this case is, Does the charter provision or the ordinance in force at the time of the erection of the building (No. 1198), forbid the erection? Or do they, taken together, so forbid it?

The charter says (Trans. fol. 51, p. 25), that the Board of Supervisors shall have power

> "5. To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

If this is not a delegation to or conferring upon the Board of Supervisors, the power to prohibit the erection of buildings within such limits, it is impossible to say what it is. The language is plain, and by no construction, even a strained one, can it be held that the freeholders intended to do other than leave to the Board of Supervisors all action in this connection.

That this charter provision is not self executing, will undoubtedly be admitted here, as it was on argument in the State Court.

Had the framers of the charter intended to prohibit the erection of wooden buildings, they would

not have declared that the supervisors have that power.

How can it be said that an instrument, expressly giving to a legislative body the power to do certain things, has done those things itself, in the very article giving that power to the legislative body?

No case has been cited making any such holding, no argument sustaining the conclusion made, no reasons for the conclusion are given.

The decisions as to *constitutional provisions* are of course applicable to the charter provisions.

In French v. Teschemeker, 24 Cal. 518; Art. 14, Sec. 36, of the constitution, reading as follows:

> *"The stockholder of a corporation shall be individually and personally liable for his portion of all its debts and liabilities"*

was under consideration. That provision is certainly far stronger than the one under consideration here, but the Supreme Court of California held that it was *not* self-executing, and that legislative action was necessary to make it effective, and that without such legislative action, it was inoperative.

In Ex parte Wall, 48 Cal. 379 (318), a provision of the constitution with regard to the establishment of county and town governments was under consideration. Art. XI, Sec. 4, of the constitution provided:

> "The Legislature shall establish a system of county and town governments which shall be as nearly uniform as practicable throughout the State."

Sec. 37 of the same article provided:

> "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, etc."

The Court said of these sections:

> "But the constitution is not self executing; the town governments must be created by statute. And it will be observed, the constitution commands the legislature to establish a system of town governments."

In the case at bar the charter provision in question provides:

> "Subject to the provisions, limitations and restrictions in this charter contained, the *Board of Supervisors shall have power:—5.* To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained and *to prohibit the same within such limitations.*"

Prior to the erection of our building, the power given to the supervisors by said charter provision was expressed to the extent only of designating how, what they termed the "fire limits" should be bounded.

But in so far as exercising the power to prohibit the erection of wooden buildings within certain limits it was not exercised until years after the erection of our building.

In Spinney v. Griffith, 98 Cal. 149, Sec. 15 of Article XX, of the Constitution, providing that mechanics etc. shall have a lien upon property upon which they bestow labor, providing "the legislature

shall provide by law for the speedy and efficient enforcement of such liens", was under consideration, the Court held that:

> "This declaration of a right, like many others in our constitution, is inoperative except as supplemented by legislative action.
>
> So far as substantial benefits are concerned the naked right without the interposition of the legislature is like the earth before the creation 'without form and void', or to put it in the usual form, the constitution in this respect is not self executing."

This language unquestionably applies to the article or provision of the charter in question here.

In McHenry v. Downer, 116 Cal. 20 (24), Section 1 of Article XIII of the constitution, providing for taxation in the following language,

> "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law",

was under consideration; the Court said:

> "It will appear at a glance that the foregoing constitutional provision is not, *and does not pretend to be self-executing.*"

This is also apparent in the charter section in question, because that section provides that the *Board of Supervisors* shall have the power to do certain things, namely, shall *prohibit the erection of certain wooden buildings.*

In Boca etc. R. R. v. Sierra Valley R. R., 2 Cal. App. 546 (558-9), the provision of the constitution

that "every railroad shall have the right with its road to intersect, connect with or cross any other railroad", was under consideration (a provision much stronger than the one in question here), and it was held *not* self-executing so as to allow the railroad, regardless of its charter powers and of the statute providing for condemnation to exercise the right to cross.

In Older v. Superior Court, 157 Cal. 770; Sec. 9, Art. 1, of the constitution, providing for trial of libel cases

> "in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause"

was in question. It was contended in that case that it was intended by the makers of the constitution to take entirely from the legislature the power of providing the grounds upon which an indictment or information for criminal libel arising out of the publication of a newspaper might be transferred for trial from the county in which the prosecution was instituted.

The Court says:

> "The constitutional provision which we are considering either bestows a right which is to be regulated and given definite operation by the statute, or it takes the place of statutory enactment and becomes itself a statute which may not be repealed by the legislature. Only upon the latter theory can it be upheld as self executing. This doctrine is well expressed by Judge

Cooley as follows: 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing where it merely indicates principles without laying down rules by means of which those principles may be given the force of law.' The Supreme Court of Illinois has said:

'Where the constitution requires the performance of an act, but provides neither officers, the means or the mode in which the act shall be performed, in such a case there is no other means of carrying such provision into effect but by appropriate legislation. In such case the constitution does not execute such provisions.' Applying the rule above expressed, it becomes clear that the section of the constitution which we are considering is not self-executing. If the members of the constitutional convention had intended to take the subject of change of venue in these cases entirely away from the legislature, it seems most highly probable that they would have provided in the constitution all of the machinery for transferring the case."

So, in the case at bar, if the charter makers had intended that section of the charter to be self-executing, they would never have charged the Board of Supervisors with the duty therein imposed.

The Board of Supervisors did not, as we have already shown, make any enactment prohibiting the erection of such buildings, until years after the erection of our building; and they did then, recognizing their obligation to make such prohibition under the terms of the charter, pass an ordinance

which did in terms prohibit the erection of such buildings.

If there be anything in the interpretation of the charter by the Supervisors themselves, which would affect this Court, this should certainly do so. It shows that the Supervisors and their advisers *did* consider it necessary to pass such ordinance, and it was a recognition by them of the fact that there was no prohibition against the erection of buildings such as that in question.

DOES THE ORDINANCE PROHIBIT THE ERECTION OF THE BUILDING?

The ordinance in force at the time of the erection of the building (Ordinance 1198) was entitled,

> "Defining the Fire Limits of the City and County of San Francisco,"

and reads as follows:

> "Section 1. The fire limits shall be bounded by a line (and proceeds to describe a territory, within which the building in question was erected).
>
> Section 2. Every person, company or corporation violating the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding five hundred (500) dollars, or by imprisonment not exceeding six (6) months, or by both such fine and imprisonment."

Manifestly there is no *prohibition in words* in said ordinance, and the question arises will courts

import a prohibition into an ordinance, penal in its nature?

It is well established that fire limits ordinances, being penal in their nature, must be strictly construed.

Dillon, in his work on Municipal Corporations (5th Ed.), Vol. II, p. 1106, says:

> "But the power to establish fire limits and to regulate the manner of constructing buildings therein is in derogation of common right, and must be *strictly construed* in favor of the owners of buildings within its limits."

In City Council of Montgomery v. Louisville & N. R. Co., 84 Ala., 127 (4 South. Rep. 626), the Court held that such an ordinance, being penal in its nature, must be strictly construed against the municipal authorities.

Is it possible to construe the words, "the fire limits shall be bounded", to mean "No wooden building of any kind whatever shall be erected within the following territory"?

Can a citizen be deprived of his liberty and of his property under an ordinance such as that?

When arrested, what charge could be made against him? What prohibition did he disregard, what injunction did he disobey?

As was said by the Supreme Court of Oregon, in Morton v. Wessinger, et al., 113 Pac. Rep. 7, where a San Francisco ordinance was under consideration,

> "All statutes which encroach on the personal or property rights of the individual, are to be construed strictly, and in the absence of express words or necessary intendment or implication, it will be presumed that a statute is not intended to interfere with or prejudice a private right or title. 26 A. & E. Ency., 661."

The only ordinance in force concerning fire limits at the time of the erection of the building was No. 1198.

That ordinance read, "The fire limits shall be bounded", etc.

Not one word to indicate what is meant by fire limits is contained in the ordinance. There might be a dozen "fire limits", each with a different limitation. In one no wooden building over one story in height could be erected; in another, no canvas buildings could be erected; in another, no wooden building used for other than dwelling purposes could be erected; in another no brick or concrete or steel building if it had a wooden roof; and so on indefinitely.

There is absolutely nothing in the ordinance which justifies the conclusion that it was intended to prohibit the erection of a one-story wooden building.

It would be a strained construction which would interpret the words "The fire limits shall be bounded", to mean "No wooden building of any kind whatever shall be erected within the following territory".

Possibly the supervisors had *intended* to put into the ordinance some words which would make the erection of certain kinds of buildings within the described territory unlawful, but if they did so intend, the writer failed to insert them.

That they recognized this fact is shown by Ordinance 1008 (new series) (enacted December 22, 1909), in which such language was used.

Even *without* invoking the rule of strict construction, we submit the ordinance cannot be construed as forbidding the erection of the building in question.

With the strict construction which must be applied to the ordinance, how can it be said anything is prohibited?

It is a *penal* ordinance. The violation of it (if there had been any provision to violate) would have been a misdemeanor.

We submit that an ordinance of this character, attempted to be used to deprive a man of his liberty and his property—to ruin him, must contain prohibitive words; otherwise, it *prohibits* nothing.

DO THE CHARTER PROVISION AND THE ORDINANCE (1198) TOGETHER FORBID THE ERECTION OF THE BUILDING?

The charter provision, under which the lower Court found the erection of the building unlawful, gives to the Board of Supervisors the power,

> "5. To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

No contention is made that the supervisors ever (prior to the erection of the building) passed any ordinance which, in words, fixed limits within which wooden buildings or structures shall not be erected or maintained, and as we have shown there is not a word in Ordinance No. 1198 about wooden or any other buildings, nor was there any ordinance "*prohibiting the same within such limits*", when the building was constructed.

It will not, we think, be contended that the charter provision is self-executing, and it is apparent that the power to *prohibit* such building had not been exercised.

It will not be sufficient to say that the failure to do so was an oversight; to deprive one of his property, the ordinance must contain clear and distinct provisions to that effect.

As we have shown, and as is apparent from a reading of the charter provision, the charter makers delegated to the Supervisors the task of forbidding or prohibiting the erection of buildings.

> "To fix the limits within which wooden buildings or structures shall not be erected, placed or maintained, *and to prohibit the same within such limits.*"

As well might it be contended that the charter provision had fixed such limits, as to contend that it had prohibited the erection of our building.

But the Supervisors did not, until over three years after the erection of the building pass any ordinance making unlawful the erection of such buildings.

Counsel for defendants contended that the use of the words *"fire limits"* in the ordinance was sufficient, without any express prohibition.

But, leaving aside for the moment the rule that such ordinances must be strictly construed, "fire limits" is an expression of exceedingly varied meanings.

For instance in Webster's International Dictionary appears this definition:

> "The limits fixed by a town or city government within which no framed structures may be built *and no building may have a shingled roof.*"

It is a matter of general knowledge that in many towns and cities, wooden buildings within certain limits are required to have roofs other than shingled ones; other cities have limits designated as fire limits, in which no *movable* buildings, nor any *tent* may be placed. It is also a matter of general knowledge that certain limits are fixed in many places within which certain occupations and businesses which increase the fire hazard may not be conducted. In fact any district in which buildings, whether all or part wood, canvas or of any other inflammable materials and businesses or occupations which add to the danger of fires are prohibited, could be called "fire limits".

In certain portions of the so-called fire limits of San Francisco, are frame buildings with a veneering of brick. A special district might be established in which such buildings might not be allowed. Would not that district be a "fire limits" too?

So, as shown by the above quotation, a district in which no building could have a wooden or shingle roof (no matter what the construction of the rest of the building might be) could be designated as "fire limits".

Who is to say what the Supervisors intended to forbid in the district established by said ordinance? Did they intend to allow the placing of tents and movable buildings? Did they intend to allow brick buildings with shingle roofs? Did they intend to limit the inhibition to wooden buildings?

How can any one say which of the many meanings of "fire limits" was intended by the Supervisors?

The experience of San Francisco has shown that there is no building material which is fire proof. That the matter of destructibility is a matter of degree, only.

Therefore, in establishing fire limits, it is the almost universal custom to describe what particular materials may be used in the particular district as was done in San Francisco by the Supervisors after the completion of our building.

We submit that under the well established rule, namely, that all statutes which encroach upon the

personal or property rights of the individual are to be construed strictly, and in the absence of express words or necessary intendment, it will always be presumed that it was not intended by the statute to interfere with or prejudice a private right, it must be presumed that the ordinance was not intended to interfere with our rights.

SAID ORDINANCES ARE DISCRIMINATORY.

Assuming, without conceding, that the ordinance in force at the time of the erection of the building, did prohibit the erection of wooden buildings, yet it, like Ordinance 1008 (new series), which was enacted years after the erection of the building, is plainly discriminatory.

Tugman v. Chicago, 78 Ill. 405;
Ex parte Bohen, 115 Cal. 372;
Plymouth v. Schulties, 135 Ind. 339; 35 N. E. 12-14;
Richmond v. Dudley, 128 Ind. 112; 28 N. E. 312; 13 L. R. A. 587;
State v. Deffes, 45 La. Ann. 658; 12 So. 841;
State v. Du Barry, 44 La. Ann. 1117; 11 So. 718;
State v. Tenant (110 N. C. 609), ~~14 S. C. 387~~; 15 L. R. A. 425;
Lake View v. Tait, 22 N. E. 791-793;
Hudson v. Thorne, 7 Paige 261;
Yick Wo v. Hopkins, 113 U. S. 356.

Defendants cite on this subject a number of cases holding valid ordinances forbidding the erection of wooden buildings within certain limits, but in not one of them, so far as we have discovered, was the point presented here, raised or discussed.

And many of the ordinances do refer to "other combustibles", as for instance forbidding the placing of a wooden *or other combustible* roof on a building.

Wooden cannot, by any stretch of the imagination, be construed to mean *canvas* or *paper* or beaver board (which has been used and is being used in the construction of buildings). And, so far as the ordinance in question is concerned, one could erect tents or paper buildings any place in the City and County of San Francisco.

The Board of Supervisors cannot lawfully discriminate between the owner of a *wooden* building and the owner of a canvas or other combustible building.

The ordinance is further discriminatory in this: The City and County of San Francisco is permitted under that ordinance to erect and maintain within the fire limits wooden buildings. Evidently the ordinance has been construed by the defendants to *not* include *municipal corporations;* otherwise, of course, the defendants in this action would not have erected and maintained the school houses, fire houses and police station, all wooden buildings, and all erected since the erection of the building in suit, and con-

tinuously used and maintained to this time, and all for purposes more dangerous to public safety than those to which plaintiffs' building is put.

It cannot be maintained that it is not discrimination for a city to favor *itself* as against its residents and property holders, not only in the matter of the erection and maintenance of wooden buildings, but also in maintaining, without taxation, its wooden buildings, while it taxes the wooden buildings of others, while claiming them to be unlawfully maintained, at the same time taking revenue by way of license taxes from the occupants of the building for the conducting of legitimate businesses, which businesses it now seeks to destroy.

We submit the ordinance is plainly discriminatory and void.

This Court in Yick Wo v. Hopkins, 118 U. S. 356 (373) (30 L. Ed. 220), speaking on this subject, said:

> "In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus

> representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The mode of carrying out or administering an ordinance is as much to be considered in passing upon its discriminatory character as is its language. If it is being applied and administered by public authority with an unequal hand and so as to make unjust discrimination between us and the municipal corporation, the denial of equal justice, is, as was said by this Court in the Yick Wo case, within the prohibition of the constitution (118 U. S. 356, 373).

The question is, "Does the action of the city in administering the alleged law do so (to use the language of this Court in the Yick Wo case), "with an evil eye, and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights?"

If it does, the ordinance is unconstitutional, there is a denial of equal justice.

Plaintiffs and the city are in the same positions—owning and using buildings of wood, erected within the same district. The city retains and continues the use of its buildings—demolishes and destroys ours.

Let us suppose this case, one which, in these days of municipal ownership, may well arise:

The city conducting a street railway system, enacts an ordinance forbidding the erection of a wooden or corrugated iron building within certain limits.

It proceeds to erect and maintain and use extensive buildings cheaply constructed of wood or corrugated iron as car barns and repair shops within the proscribed district.

A is also conducting a railway, also needs large buildings for similar purposes but must build very costly structures of other materials if he wishes to house his cars or establish his repair shops within the district.

Or, the city is conducting a garbage destroying plant—or a laundry or a printing establishment, and prohibits others from using the same kind of buildings it uses, or from conducting similar enterprises within the same limits.

Would not such application of the law be within the prohibition of the constitution?

It is admitted that the city is doing the very thing which it attempts to prevent us from doing, is applying and administering with an unequal hand

the ordinances, is denying us that which it takes itself.

The principle laid down in the Yick Wo case has been reaffirmed time and again.

It is not enough that the ordinance or statute *on its face* is a valid enactment. Its *application* will always be considered in determining its validity.

It is not from its *proclaimed purpose,* that its repugnancy to the constitution will be determined, but from the natural effect when put in operation, and *as put in operation or applied.*

In Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169), this Court said:

> "but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance."
>
> "This court in the case of Yick Wo v. Hopkins, 118 U. S. 356 (6 Sup. Ct. 1064, 30 L. Ed. 220), held that although an ordinance might be lawful on its face and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

There is much resemblance between the Dobbins case and the case at bar.

An ordinance of the City of Los Angeles made unlawful the erection and maintenance of gas works

outside of a certain described district. While this ordinance was in force plaintiff contracted with a gas company for the erection of gas works on land to be purchased by her, bought lands within the privileged district, secured a permit for the erection of the works, and the foundations were constructed at a cost of over $2500.

After the foundations had been nearly completed, the city council passed a second ordinance, amending the first and limiting the territory within which the erection of gas works was permitted, so as to place the land so purchased outside that territory.

The work was prosecuted however, until employees of the persons erecting the works were arrested for violating the second ordinance.

A short time after, the ordinance was again amended with respect to the description of the territory, and arrests of employees of the erectors for violating the third ordinance were made.

This Court quoted from Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679) (among other matters), the following:

> "The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but, if by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." (Citing cases.)

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 390, (38 L. Ed. 1014), this Court said:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and, when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

This Court said in the Yick Wo case:

> "the equal protection of the laws is a pledge of the protection of equal laws'.

The city cannot make (or apply) a law to its benefit as against the interests or rights of its inhabitants.

This Court again in Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. Ed. 679 (689)), said:

> "It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But *upon this general question we have said that the guarantee of the equal protection of the laws means 'that no person or class of persons shall*

be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22, 31, sub nom. Bowman v. Lewis, 25 L. Ed. 989, 992. We have also said: 'The 14th Amendment in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction—the equal protection of the laws" undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, *but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights;* that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; *that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition.*" * * * (Citing cases.) (Italics ours.)

In Hayes v. Missouri, 120 U. S. 68, (30 L. Ed. 578), this Court said, speaking of the 14th Amendment:

"It merely requires that all persons subjected to such legislation *shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.*" (Italics ours.)

In Standard Computing Scale Co., Ltd. v. Farrell, etc., 242 Fed. Rep. (D. C., S. D., N. Y.) 87 (90) the Court said:

> "Unconstitutionality is usually tested by an examination of the language of a statute, but sometimes (even if that language be unexceptional) *the action or practical application thereof may give rise to an unconstitutionality not inherent in the law, but arising from the unjust and extravagant application thereof, by the human beings charged with its reasonable enforcement.*" (Italics ours.)

In South & N. A. R. Co. v. R. R. Commission of Alabama et al., 171 Fed. Rep. (C. C., M. D. Ala., N. D.) 225 (230), a case where counsel for respondent contended that no inquiry was permissible as to whether carriers other than those contesting the rates were favored by changes made in the rates and classifications, which rates and classifications were still enforced against complainants, the Court said, after quoting from 164 U. S. 578:

> "And in numerous cases since then the Supreme Court has held that, the conditions being substantially the same, favor to one person, and disfavor to another, and the imposition of unequal burdens upon them, effected by the terms of a statute *or the manner in which it is enforced*, is a denial of the equal protection clause. * * * How else may the suitor show the administration of the law 'with an evil eye and an unequal hand' than by showing the instances in which the authorities have executed the law concerning different persons, the relative situation of those different persons, and the ordinary and natural effect of the administration of the law upon their rights, and whether, when as

> thus administered, invidious burdens are placed upon one person, and favors conferred upon others, who, relatively speaking, are in the same class The administration 'with an evil eye', which the constitution condemns, is the intent of the authorities as distinguished from their motive, to bring about the forbidden results. The authorities are conclusively held to intend to accomplish the ordinary, natural and probable results of their acts. The forbidden intent, and whether it has impelled the action of officials, can be ascertained only by considering what is the ordinary, natural, and direct result of such administration of the law upon the rights of the parties, as fixed and determined by the conditions and situations which they occupy, with reference to the subject matter to which such administration of the law relates."

Apply the law and the reasoning of the foregoing cases to our case.

Our property is to be destroyed. The *property of the city*, identical in character, similarly located, is to be protected, preserved, used.

Can a more unjust, unfair, unequal application of the law, of the ordinance, be imagined than that shown in this case?

Where have the plaintiffs in error *the equal protection of the law* guaranteed by the constitution?

We submit that, even if it should be held that the ordinance is valid, its administration, its application, entitle us to the injunction prayed for.

SAID ORDINANCE No. 4170 (NEW SERIES) DEPRIVES OF VESTED RIGHTS WITHOUT DUE PROCESS OF LAW AND WITHOUT COMPENSATION.

The ordinance under which the destruction of the building is sought, attempts to deprive of vested rights, acquired years before its enactment.

The building was a substantial building, costing $12,000, erected without protest, an oven, constituting a part of said building, and costing $700, having been installed with the consent of and under the written permit and supervision of defendants.

The building was assessed and taxed by the city and the taxes paid by plaintiffs in error from the time of its erection to the present time. (Transcript, pp. 21 and 22, fols. 44 and 45.)

While it needs no citation of authorities to sustain the proposition that an ordinance or a statute depriving one of vested rights is unconstitutional as in violation of the Constitution of the United States, we call your honors' attention to the following:

In Mulligan v. Smith, 59 Cal. 230, the Court says:

> "For it is a principle which underlies all forms of government by law, that a citizen shall not be deprived of life, liberty, or property, without due process of law. The Legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place and tribunal, to be heard in defense of his rights. This constitutional guar-

anty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, *whether the proceeding be judicial, administrative, or executive in its nature.*"

Again,

"But no man may be divested of his property or of his rights to property, without process of law. As a jurisdictional prerequisite he is entitled to his notice and his hearing, and only after such notice and hearing may the action of the Court be upheld."

Thompson v. Superior Court, 119 Cal. 543.

In Detroit v. Detroit & Howell P. R. Co., 27 Conn. 140, it was held that a provision of a charter requiring any plank road company to remove its toll gate beyond municipal limits is invalid and unconstitutional as taking property without due process of law.

If the Board of Public Works of San Francisco can lawfully exercise such power as it proposes to do in this case, if it can proceed without let or hindrance at its discretion to destroy any building in its unrestrained judgment without hearing, without opportunity to the owner given to object or to show that their conclusions are wrong, then every man holds and occupies property in this city and county solely subject to their leave and license and any man's building may be pulled down over his head whenever they for any reason consider it proper that it should be done. Surely the taxpayers do not hold their property upon so

fragile a tenure. It is the settled law that a building, when erected, will not, merely because it is a wooden building, be allowed to be removed or destroyed, because of a subsequently enacted ordinance, making the building or its maintenance unlawful.

In re Yick Wo., 68 Calif. 294 (298).

See, also,

Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169);

Morton v. Weisinger, 58 Or. 80 (113 Pac. 7).

THE ORDINANCES IMPAIR OBLIGATIONS OF CONTRACTS.

When the city permitted us to erect the building, there was at least an implied contract upon its part that we should enjoy the building, that we should be permitted to maintain the building. When it permitted us to erect the building, it also gave to us the right to enter into contract with others for the enjoyment of the use of the building. The building must have been erected with the idea that contracts for leasing would be entered into.

Having entered into these various contracts, we should be permitted to enjoy their fruit and we should not be put into a position where we may be subjected to heavy damages for violation of our contract, without our fault, and by the unauthorized acts of defendants.

The violation of an implied contract is as serious a matter as the avoidance or the impairment of an express contract.

The ordinance says:

> "It shall be unlawful for any person • • • *to erect, place or maintain any wooden building or structure of any kind whatsoever in that portion,*" etc.

No matter *when* the building was erected, no matter what kind of a building it may be, it cannot, if the ordinance is valid, be maintained or erected or placed within that district.

The prohibition is *not* limited to buildings erected at any particular time, and strange to say, is not limited to structures of any kind whatsoever.

"And wooden building" means any wooden building, *whenever erected.*

Judge Searles in the case of In the Matter of Yick Wo, 68 Cal. 294 (298), said:

> "To prevent the construction of wooden buildings within the densely inhabited portions of the city may become an imperative duty upon the part of the authorities. *They may not destroy those already erected.*"

In N. P. R. Co. v. Spokane, 52 Fed. 428, it was said:

> "A city has no authority to destroy a wooden building within the fire limits because it is maintained in violation of the permit granted for its erection, and an injunction to restrain such destruction is proper."

"The general rule is that mere police legislation of this character operates only *prospectively*, and does not demand the sacrifice of existing physical property. Freund, Police Power, § 538; Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443."

Jackson v. Miller, 60 Atl. 1019 (69 N. J. Eq. 82).

In the same case the Court said:

"The ordinance regulating the height of wooden fences was passed after the erection of the fence, and the fence not being in itself a nuisance which required immediate abatement in the interest of public safety, the owner is entitled to test the validity of the ordinance as affecting his property, if it should be held to extend to the maintenance of an existing fence. Even a law requiring all frame buildings within certain limits to be taken down, or preventing their use, would probably be held unconstitutional. Id ° ° ° The ex parte opinion of the superintendent of buildings that the maintenance of the fence is a violation of the ordinance is of no effect whatever as a judgment upon the question, and legislation giving it that effect would be unconstitutional." (Citing authorities.)

It must be remembered that no claim is made that the building in question is a nuisance.

In Morton v. Weisinger, 58 Or. 80 (113 Pac. 7), the Court said, (speaking of a San Francisco ordinance),

"Municipal ordinances establishing fire limits cannot be retroactive and require the removal of existing building therefrom."

See, also,

Denver v. Mullen, 7 Colo. 345 (353);
Hutton v. Camden, 39 N. J. L. 122.

If the above be not the law, let us see what would be the consequences!

In San Francisco there are today probably five thousand or more buildings which were not erected in accordance with the building ordinances as they exist today. In some cases it is because the ceilings are too high, or the ceilings are too low, or the studding is not of the thickness required by the present ordinances. Would it be supposed for a moment that the Board of Public Works could now, without any notice, proceed to tear down these buildings, or what would be the equivalent, compel the owners of the buildings to reconstruct them?

This is not a mythical case at all. It is a fact which confronts us. Certainly if the Board of Public Works has the right to do what it is attempting to do in this case, then it could cause damage of the amount of millions upon millions of dollars in the City and County of San Francisco by compelling owners either to reconstruct buildings or to tear down the buildings.

City of Buffalo v. Chadeayne, 134 N. Y. 163, was an action to recover a penalty for an alleged violation of an ordinance prohibiting the erection of a wooden building within the fire limits. The building was erected by the permission of the city

council. The council afterwards rescinded the permission and sued.

The Court held that the owner of the building had, by the permission, acquired vested rights of which the council had no power to deprive him, and that the action was not maintainable.

In Detroit v. Detroit & Howell P. R. Co., 43 Mich. 140, it was held that an Act requiring a plank road company to remove its toll gate beyond municipal limits, the right to so place its gates having been previously given, was invalid as taking property without due process of law.

Certainly to demolish our property would be to take or destroy it without any process of law.

Said ordinance is retroactive.

Not only does it attempt to make unlawful the erection of a wooden building, but it also attempts to make unlawful the *maintenance* of a wooden building *erected at any time*, no matter whether the building was erected before the alleged enactment of said ordinance or since that time.

In re Yick Wo, 68 Cal. 294 (298), the Court said:

> "To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. *They may not destroy those already erected.*"
>
> Morton v. Weisinger, 58 Or. 80 (113 Pac. 7);
>
> Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169).

This doctrine has never been changed in the State of California, and is based on the soundest reasons.

In addition to this the ordinance deprives us and our tenants of rights acquired before the enactment of the ordinance.

For example, the tenants who are conducting businesses under licenses issued to them by the said city and county are cut off in the middle of their terms without redress.

We, having entered into contract with our tenants, are deprived of the benefits of those contracts entered into before the enactmnt of the ordinance and at a time when there could be no question of the right to enter into said contracts.

Wayman Inv. Co. v. Wessinger, 13 Cal. App. 108.

Not only would we be deprived of the benefits of the contracts, but we may be rendered liable for heavy damages because of our inability, following the demolition or removal of the building, to carry out the terms of the contracts on our part to be performed.

Thus it will be seen that not only is this ordinance retroactive in the ordinary sense, but retroactive in the fullest sense of an ordinance which is unlawful in that it deprives parties of rights acquired before its passage; not only of rights, but of vested rights.

In 24 Amer. Eng. Ency. of Law it is said, page 877:

> "Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective, in its operations and opposed to those principles of jurisprudence which have been universally recognized as sound."

Mr. Justice Story in Society etc. v. Wheeler, 2 Call (U. S.) 139, says:

> "Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective."

Freund on Police Power, sec. 685 (p. 708), says:

> "Thus the establishment of fire limits within which *frame* buildings are forbidden is a regulation as applied to vacant property, while as to existing frame houses it would be a taking of property; hence the exemption of such houses is not only not contrary to, but is demanded by, the constitution."

Again in sec. 538 he says:

> "Therefore the general rule is that such legislation operates only prospectively, and does not demand the sacrifice of existing physical property. So the prohibition of wooden buildings within designated 'fire limits' applies only to buildings to be erected in the future."

In City of Buffalo v. Chadeayne, 134 N. Y. 163, 165 and 166, an action to recover a penalty for the erection of a wooden building within the fire limits, which building was erected under a permit from the common council, the Court held that having received permission to erect the building,

> "as soon as he entered upon the construction of the buildings and incurred liabilities for the work and material, he had a property interest in them. To this right he was entitled to protection".

After this the resolution authorizing him to build was rescinded, and on this subject the Court said:

> "The State has given to the municipality power to prescribe the limits in which wooden buildings shall not be erected. *This pertains to the future,* and not to existing buildings."

See, also,

Jackson v. Miller, 60 N. J. Eq. 182;
Cleveland v. Lenze, 27 Ohio St. 385 (390);
Inhabitants of Watertown v. Sawyer, 109 Mass. 320;
Brown etc. v. Hunn, 27 Conn. 382.

THE ORDINANCE IS UNREASONABLE.

What can be said of an ordinance which will permit a building to be constructed of paper, of canvas, of celluloid, of cardboard, of beaver board, or of any other inflammable material and yet prevent the construction of a wooden building, far less inflammable than any of the others?

If this is not unreasonable, it is hard indeed to imagine anything which is unreasonable.

Under that ordinance, if we had nine canvas tents, with iron poles, or nine houses built of beaver board, or of any other material than wood, we could enjoy and maintain them without hindrance.

There is implied in every delegation of power to a municipal corporation a condition that the power must be exercised reasonably; and hence every unreasonable ordinance is *ultra vires* and void.

Reasonableness is one of the inherent limitations of the police power.

Freund on Police Power, sec. 63.

This Court said in Plessy v. Ferguson, 163 U. S. 537.

> "The reply to all this is, that every exercise of the police power must be reasonable."

The ordinance declares it unlawful, not only to erect or maintain any *wooden* building, but also *any structure of any kind whatsoever.*

It may be contended that the word "wooden" refers to structure; but the construction of the sentence is such that it cannot be so interpreted.

The words "of any kind whatsoever" would be entirely unnecessary if the word "wooden" referred to structure. If necessary, it should have been applied to "building" and have read, "any wooden building of any kind whatsoever" or "any wooden structure of any kind whatsoever".

In our opinion the only correct and possible reading of the ordinance declares unlawful, not only the erection and placing or maintaining of any wooden building, but also the erection, placing or maintaining of any structure of any kind whatsoever.

In our opinion the erection of a steel building or brick building or any other kind of building or structure is forbidden if the word "structure" includes "building".

If, on the contrary, the word "wooden" applies to "structure", then it is unlawful for any one within that district to keep in his house or office, a wooden desk or chair or bookcase, for the word "structure" includes all these articles.

For instance, in State v. Kean, 45 Atlantic Reporter 256, a baywindow was held to be a structure.

In Phoenix Insurance Company v. Luce, 11 Ohio Cir. Ct. R. 476-483, a boiler and engine were held to be structures. In Karaseck v. Peier, 22 Wash. 419 (61 Pac. 33), and Jackson v. Miller, 69 N. J. Eq. 182, it was held that a fence was a structure.

So a telegraph pole, a wharf, a bridge and various things other than buildings have been held to be structures.

If the word "structure" were used without any intensifying words, "of any kind whatsoever", it might be contended possibly that the word "struc-

ture" meant a building. But to speak of "any structure of any kind whatsoever" must mean what it says.

The Standard Dictionary defines a structure to be "that which is constructed; a combination of related parts, as a machine, a building or a bridge".

Is or can there be imagined anything more highly unreasonable than this, especially when we consider the vast amount of territory covered by the ordinance?

It will not do to say that only a building is meant. If that had been the case, there was no necessity for putting in "structure". If that had been the case, there was no necessity for putting in "structure of any kind whatsoever".

Upon its face the ordinance unquestionably makes a vast waste of a large part of the city.

We submit that such an ordinance cannot be held to be valid.

DEFENDANTS HAVE NO LEGAL POWER TO DO THE ACTS THEY THREATEN TO DO.

The charter prescribes the powers of the Board of Public Works, and provides that said Board shall have the *supervision* of any and all *building construction* in the city and county.

> "The board of public works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the supervisors * * * of the supervision

of any and all building construction of the City and County." Charter subd. 5, sec. 9, chap. I, Art. VI.

Building construction of course refers, either to the construction of new buildings or the alteration and repair of old ones.

Construction cannot be twisted or distorted to mean "destruction" or "demolition or removal".

The control of the Board ceases the moment the *construction* is completed, that is when the building is erected or the alterations and repairs finished.

The Supervisors cannot give to the Board any greater power or authority than that conferred by the charter.

All powers possessed by the Board of Supervisors are derived from the charter, and the only way those powers can be increased is by an amendment to the charter.

DEFENDANTS ARE ESTOPPED FROM DESTROYING OR REMOVING THE BUILDING.

We submit further that the City and County of San Francisco and its servants are estopped by the actions of the city from proceeding in this matter.

That the city can be estopped, has been held in numerous cases.

City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368;

City of Los Angeles v. Cohn, 10 Cal. 373;

Martel v. E. St. Louis, 94 Ill. 67.

Where a city did not object to the preliminary outlay for laying gas pipe, it was held estopped to deny the use of the streets for that purpose in

Atlanta v. Gate City Gaslight Co., 71 Ga. 106.

And where a municipality allowed expensive buildings to be erected without a warning, knowing that they were to be used for a purpose forbidden by a city ordinance, it was held estopped from asserting that ordinance in

Athens v. Georgia etc. Rd., 72 Ga. 800.

See also

Dobbins v. Los Angeles, 195 U. S. 223.

In the case at bar an expenditure of $12,000 was allowed, a written permit for the installation of an oven costing $700 was given, and the oven was installed in the building under the supervision of defendants. The city collected taxes from us, is going to collect more taxes now due under penalty of selling us out, has licensed the tenants to do business and has collected money for doing so, has allowed the building to be used and maintained for years without protest or interference, and all with full knowledge of the construction and maintenance of the building.

The city itself is maintaining many buildings of the same *construction* under identical circumstances, except that no taxes are paid thereon, all of which were erected subsequent to the erection of ours.

How can the city claim the right to destroy our property under those circumstances?

If it proceeds to destroy our building, yet it will collect from us taxes on the building it destroyed!

It seems to us that this is a case where the doctrine of estoppel should and does apply.

The sums of money involved are large—the damage which will be done us is incapable of estimation, and is irreparable.

In Martel v. E. St. Louis, 94 Ill. 67, it was held that a city cannot recover a penalty from a person pursuing a trade or calling, where, for a consideration paid it, a license authorizing him to carry on such trade or calling has been issued to him, and *it is of no consequence whether the ordinance under which the privilege was granted was valid or invalid* as the action of the city in issuing the license induced the violation complained of, and under such circumstances *it is estopped from questioning the validity of the license or privilege.*

In C. R. I. & P. R. R. Co. v. City of Joliet, 79 Ill. 25, a city had recognized the right claimed by a railroad company over certain "public grounds" of the city in various ways, and among others, by the levying of taxes, and the Court said:

> "The levying of local taxes under the ordinances of the city, was, in effect, a declaration upon the part of the city that the county was the owner of this property; an admission that it had the dominion over it, and the right of directing its use, and consequently a virtual assent to and confirmation of the grant of the right of way over the same, which it had made to the railroad company.

> "From all these positive acts of recognition on the part of the city of Joliet of the right claimed by the railroad company, and long acquiescence in its exercise, there must be held to be estoppel *in pais* against the city, if that principle be applicable at all to municipal corporations, as respects public rights."

In Dobbins v. Los Angeles, 139 Cal. 179, the Supreme Court of California had held that the fact that the plaintiff had lawfully commenced its work by purchasing land for a site for gas works within the limits allowed by the ordinance then in force, and had expended money in laying a foundation, and had entered into contracts for the erection of its works, and had secured a building permit from the fire commissioners in pursuance of fire and building ordinances, could not estop the city from the further exercise of its police power to change the limits so as to make the erection of such gas works unlawful, although lawfully begun, and despite the consent of the city evidenced by the issuance of a building permit.

This court, in Dobbins v. Los Angeles, 195 U. S. 223 (49 L. Ed. 169) reversed the judgment of the Supreme Court of California, holding the ordinance changing the limits (under the facts as admitted by demurrer) was an arbitrary interference with property rights protected by the Fourteenth Amendment to the Constitution of the United States.

In our case, the city permitted the erection of the building at a cost of $12,000, express written

permission to construct an oven at an expense of $700 was given, for nearly ten years has acquiesced in our erection and maintenance of the building, has during all the time since its erection levied and collected taxes thereon, has issued licenses to and received money from our tenants, and is now, we submit, estopped from claiming that the building was improperly erected, and from interfering with our peaceable enjoyment of the property.

CLEAN HANDS.

In the State Courts counsel for defendants argued that we cannot attack Ordinance 4170, because we have "erected a wooden building in violation of the law", and are continuing "in violation of law to maintain it to the present time".

They assumed that the charter and Ordinance 1198, made it unlawful to erect the building, which, we think we have shown to be an erroneous assumption.

Doesn't it seem rather strange for the city which is compelling us to pay taxes on this building, which has received thousands of dollars from us as taxes on the building, has charged our tenants for the privilege of doing business in the building, and which is itself maintaining like buildings, erected after ours was erected, thus making an unjust and discriminatory application of the ordinance in its own favor, and against plaintiffs in error, to charge us with having unclean hands?

But, aside from this, if the alleged ordinance is unconstitutional, it is a nullity; it is not a law, it is—nothing.

This Court in Norton v. Shelby County, 118 U. S. 425 (30 L. Ed. 178), said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In Minnesota Sugar Co. v. Iverson, 97 N. W. (Minn.) 454, the Court said (p. 457):

> "It has again and again been held that an unconstitutional statute is simply a statute in form, is not a law, and under every circumstance or condition lacks the force of law, and, further, that it is of no further saving effect to justify action taken under it than as though it had never been enacted."

In People v. Mensching, 187 N. Y. 8 (79 N. E. 884), the Court said of an unconstitutional statute:

> "It changes nothing and does nothing. It has no power to coerce or release. It has no effect whatever. *In the eye of the law* it is a mere blank, the same as if the type had not reached the paper".

and then proceed to quote the above from Norton v. Shelby County.

Cooley's Constitutional Limitations (7th ed.) p. 5, says:

> "The term 'unconstitutional law', as employed in American jurisprudence, is a mis-

> nomer, and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all."

In In re Rohrer, 43 Fed. Rep. 556, where the so-called "Wilson Bill" passed by Congress because of the decision as to the state original package liquor laws, was under consideration, the Court said:

> "For it must be kept in mind that legislative act in conflict with the Constitution is not only illegal or voidable but it is absolutely void. It is as if never enacted, and no subsequent change of the Constitution removing the restriction could validate it or breathe into it the breath of life."

If Ordinance 4170 is unconstitutional, respondents are in the position of presenting a piece of blank paper as their authority for their proposed actions.

We respectfully submit,

(1) That the Charter Provision cited is not self-executing;

(2) That the Ordinance 1198 did not prohibit the erection of the building;

(3) That Ordinance 1008 (new series), enacted after the erection of the building, is *prospective*—not retrospective;

(4) That if retrospective, it is unconstitutional as being retroactive and unreasonable;

(5) That Ordinance 4170 (new series) is void and unconstitutional,

(a) Because retroactive,

(b) Because it attempts to destroy property and deprive of vested rights without due or any process of law,

(c) Because it authorizes the determination, without a hearing, that property is unlawfully erected,

(d) Because it is unreasonable;

(6) That each of said ordinances is and all are void because discriminatory;

(7) That the attempted action of defendants is unlawful and void because discriminatory, and because with no lawful authority;

(8) That the application of said ordinances has voided and nullified them.

We therefore urge that the judgment should be reversed and that the prayer of the plaintiffs in error for a permanent injunction as asked for in their complaint be granted.

Dated, San Francisco,
December 27, 1920.

Respectfully submitted

J. F. RILEY,
Attorney for Plaintiffs in Error.